PUBLIC MATTER – DESIGNATED FOR PUBLICATION

Filed August 24, 2006

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **DAVID M. VAN SICKLE**, A Member of the State Bar.	)	**99-O-12923** **OPINION ON REVIEW AFTER REMAND BY SUPREME COURT**

In this original disciplinary proceeding, respondent David M. Van Sickle requested review of a hearing judge's decision placing him on actual suspension for six months. In a single client matter, the hearing judge found respondent culpable of charging and collecting an unconscionable fee, entering into an improper business transaction, failing to provide written disclosure of a financial interest in the subject matter of the representation, and intentionally or recklessly failing to represent the client competently.

On February 8, 2005, we filed our opinion in this case, modifying the hearing judge's culpability, mitigation and aggravation determinations and recommending that respondent be placed on one year's suspension, stayed, and two years' probation on various conditions, including 30 days' actual suspension and restitution in the amount of $8,124.99 plus interest.

The State Bar sought review in the Supreme Court, and by order dated November 30, 2005, the court remanded the matter to us with directions to vacate our recommendation as to discipline. The Supreme Court specifically directed this court to consider the appropriate

discipline in light of standards[1] 1.6 and 2.7 and *In re Silverton* (2005) 36 Cal.4th 81, 89-92, stating: "In reconsidering the degree of discipline, the State Bar Court Review Department shall consider the application of the Standards to setting an appropriate degree of discipline in this proceeding, including any ground that may form a basis for an exception to their application."

After considering the briefs on remand and taking into account all relevant factors, including the applicable standards and case law, we have reconsidered our earlier discipline recommendation and now recommend, for the reasons stated herein, that respondent be suspended from the practice of law for a period of one year, stayed, and that he be placed on probation for a period of two years on the condition that he be actually suspended from the practice of law for three months. We further recommend that respondent be ordered to comply with the provisions of rule 955 of the California Rules of Court, as more specifically set forth *post*.[2]

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[1]Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. All further references to standards are to this source.

[2]Because of the Supreme Court's remand order, and pending our further order, we depublished our earlier opinion in *In the Matter of Van Sickle* (4 Cal. State Bar Ct. Rptr. 756.) For ease of reference, we refer to that opinion as our "2005 opinion." We have construed the Supreme Court's order to mean that we are to vacate our 2005 opinion as to our discussion and recommendation of the degree of discipline. (2005 typed opinion, Sections III(C) and IV, pp. 27 -34.) We here re-adopt Sections I through III(A-B) of our 2005 opinion, and, accordingly, we republish pp. 2 -26 of our 2005 opinion as to the factual and procedural history, our culpability discussion, and discussion of aggravating and mitigating circumstances. In order to restore the portions of our 2005 opinion which we re-adopt, we set them forth anew below, utilizing the same heading designations as in our 2005 opinion.

I. STATEMENT OF FACTS

A. Procedural Facts

Respondent was admitted to practice law on December 13, 1993. He has no prior record of discipline.

In a five-count notice of disciplinary charges (NDC) filed on January 2, 2002, involving one client matter, respondent was charged with violating Rules of Professional Conduct, rule 4-200[3] (charging and collecting an unconscionable fee), rule 3-300 (acquiring an interest adverse to a client), rule 3-310(B)(4) (accepting or continuing representation of a client without providing written disclosure to the client that the attorney has a financial interest in the subject of the representation), rule 3-110(A) (intentionally, recklessly, or repeatedly failing to perform legal services competently), and Business and Professions Code section 6106[4] (committing acts involving moral turpitude by engaging in gross overreaching and coercion in representing a client).

Prior to the trial, respondent stipulated to many facts and to his culpability for violating rule 3-300. After a two-day trial, the hearing judge found culpability on all counts, with the exception of moral turpitude as alleged in count five of the NDC. The hearing judge recommended respondent be suspended for a period of one year, stayed and that he be placed on

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[3]All further references to rules are to the Rules of Professional Conduct unless otherwise indicated.

[4]All further statutory references are to the Business and Professions Code unless otherwise indicated.

probation for a period of three years on the condition of six months' actual suspension. The court further recommended restitution of the excess attorney fees to be paid within the period of his probation. Respondent filed a motion for reconsideration and a motion for a new trial, which were denied on March 18, 2003. Respondent here appeals the determinations of the hearing judge.

B. Background

In August 1994, Ivy Hei was involved in an automobile accident. At the time of the accident, Hei was delivering mail for the United States Postal Service, and her vehicle and two others, a car owned by Sukhbir Beasla and a truck owned by Corea Trucking, were involved in the crash. As a result of the accident, Hei suffered severe injuries and ultimately lost two years of income. Hei was initially represented by Attorney John T. Nagel in a personal injury action to recover damages for her injuries. The contingent fee agreement between Hei and Nagel, dated September 1, 1994, called for Nagel to represent Hei in the personal injury action in exchange for one-third of any recovery.

Nagel filed a lawsuit against Sukhbir Beasla and the driver of that vehicle, Kirpal Kaur Beasla (the Beasla defendants), in December 1994. This lawsuit did not include Corea Trucking or the driver of the truck as defendants. Among other things, Nagel engaged in discovery on Hei's behalf, including preparing answers to form interrogatories. In May 1995, the insurance carrier for the Beasla defendants offered the policy limit of $50,000 in exchange for a release of all claims arising from the accident, including all causes of action against all persons involved. Hei initially agreed to the settlement, and Nagel agreed to reduce his fee to 25 percent of the

recovery. However, in June 1995, Hei withdrew her acceptance of the offer. On July 28, 1995, Nagel filed an amended complaint which included as defendants Corea Trucking and the driver of the truck, Shane Nelson Corea (the Corea defendants). On August 10, 1995, Hei substituted herself in propria persona in place of Nagel.[5] Also on August 10, 1995, Nagel filed a lien against any recovery in the case in the amount of $1,289.73 in costs plus one third of any recovery (rather than the 25 percent Nagel had agreed to take if Hei accepted the $50,000 settlement offer). In August 1995, Hei filed a personal injury suit against the Corea defendants which was separate from the personal injury suit previously filed by Nagel.

C. Hei Retains Respondent

From August through early October 1995, Hei saw two to three other attorneys before coming to respondent. She retained him to represent her in three separate matters, all relating to her 1994 accident: 1) personal injury lawsuits against the Beasla and Corea defendants; 2) a workers' compensation claim; and 3) a fee dispute with her first attorney, Nagel.

1. Hei's Personal Injury Case

On October 5, 1995, respondent entered into a written contingent fee agreement with Hei to represent her in the personal injury actions against the Beasla and the Corea defendants in exchange for an attorney fee of 35 percent of any "settlement &/or judgement" plus costs. This written agreement made no mention of Hei's prior representation by Nagel, but according to

[5]Hei confirmed in her testimony at trial that she was unhappy with Nagel because he would not proceed with a personal injury case against Corea Trucking, and she felt that he had not performed all of the services he was supposed to perform under her agreement with him.

respondent, Hei agreed to bear the full risk that she would be required to pay Nagel his fees in addition to her obligation to pay respondent's 35 percent contingent fee if he would take her case. However, according to Hei, respondent never explained to her that she was required to assume the risk that she would have to pay *both* Nagel's and respondent's fees.

In December 1995, respondent obtained Hei's personal injury file from Nagel. Also in December 1995, Hei agreed to accept a settlement in the action against the Beasla defendants for the policy limit of $50,000. Unlike the first settlement offer from the insurance carrier for the Beasla defendants, this settlement allowed Hei to proceed with her claims against the Corea defendants. At that time, as Hei informed respondent, Hei had a four-year-old son, Hei's house was going into foreclosure, and Hei's car was going to be repossessed.

In early January 1996, respondent received three checks from the Beasla defendants' insurance carrier totaling $50,000: 1) a check in the amount of $6,327.26 payable jointly to respondent, the United States Department of Labor (USDOL) and Hei; 2) a check in the amount of $12,500 payable to respondent's trust account, Hei and Nagel's law firm; and 3) a check in the amount of $31,172.74, payable to respondent and Hei. Respondent apparently placed the $12,500 claimed by Nagel in respondent's trust account, pending resolution of the fee dispute. Shortly thereafter, respondent provided Hei with the following accounting of his disbursements of the remaining $37,500: 1) a check for $6,327.26 to Hei for payment to the USDOL in satisfaction of its lien, from which the USDOL would return $2,230.29[6] to Hei to be paid to

[6]Respondent was mistaken as to the exact amount of the USDOL fee reimbursement, apparently because of a typographical error in respondent's accounting for the disbursement of

respondent as his 35 percent contingency fee (see discussion below); 2) a distribution to respondent of $1,250 as his fee for assisting Hei to prepare for the fee arbitration against Nagel (see discussion below); 3) a distribution to respondent of $10,910.45 in fees, representing approximately 35 percent of the remaining settlement check for $31,172.74;[7] and 4) a payment to Hei of $19,019.92 as her share of the personal injury settlement. Accordingly, on January 15, 1996, respondent provided Hei with a check for $19,019.92, and he distributed $12,160.45 to himself ($1,250 as his fee for assisting Hei in preparing for the Nagel fee arbitration plus $10,910.45 as his 35 percent contingency fee for the personal injury case). Respondent later collected additional fees of $2,214.54 from the USDOL and $500 from Hei for his appearance at the Nagel fee arbitration.

Sometime during the last six months of 1996, respondent prepared for trial against the Corea defendants. He investigated Hei's allegations that Shane Corea had a bad driving record, consulted traffic and collision experts, prepared accident site schematics, and consulted with Hei's doctors. The trial against the Corea defendants was initially scheduled for December 1996, but it was twice continued and finally held in early March 1997. Respondent represented Hei through this three-day trial. The jury in that case found for the Corea defendants, and therefore neither Hei nor respondent collected additional funds as a result of that case.

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the settlement proceeds. Therefore, respondent erroneously set forth the amount of the check payable to the USDOL as $6,372.26 and erroneously set forth the amount of the fee reimbursement as $2,230.29, when the correct amount was $2,214.54.

[7]Respondent did not include the $12,500 held in trust for the Nagel fee dispute or the amount of the USDOL medical reimbursement in the gross amount for purposes of computing his 35 percent contingency fee.

2. Hei's Workers' Compensation Claims

As a result of Hei's employment by the United States Postal Service, she received federal workers' compensation medical benefit payments of $6,327.27, which were apparently paid to Hei before she retained respondent to represent her, and for which the USDOL filed a lien against any personal injury recovery obtained by Hei.

On November 21, 1995, respondent entered into a second contingent fee agreement with Hei to represent her in "enforcing a cause of action arising out of work related injury of 8/18/94 accident." This fee agreement provided that respondent would receive 25 percent of any "Benefits, settlement or judgment" relating to Hei's claim for workers' compensation benefits.

Respondent testified that he and Hei initially signed this contingency fee agreement based upon his understanding of the California workers' compensation rules and before he realized that this was a federal workers' compensation case. Because of this misunderstanding, in December 1995, respondent and Hei also signed a California form entitled Notice of Attorney Representation and Disclosure Statement which stated that the normal range of fees for representation in a workers' compensation matter was between 9 and 12 percent of the benefits obtained.[8] He further testified that when he subsequently discovered that Hei had already filed a federal workers' compensation claim for benefits which had been denied, he realized that Hei was hiring him to file an appeal and a motion for reconsideration of the USDOL's denial of Hei's claim. Respondent accordingly believed that a contingent fee agreement was inappropriate for

[8]Respondent testified below that the initial agreement called for a 12 and one half percent contingent fee, but the agreement itself did not reflect that amount.

his contemplated services, and he testified that sometime during early 1996, he and Hei verbally modified the workers' compensation fee agreement to provide (1) for a flat fee in the amount of $2,214.54 for the appeal and rehearing of the denial of her claim and (2) that this fee would be taken from the personal injury settlement funds.

Contrary to respondent's testimony, Hei testified that she never voided or canceled the written agreement which called for a 25 percent contingency fee for respondent's services in the workers' compensation matter. A letter from her to respondent, dated July 31, 1996, corroborated her testimony. Our de novo review confirms that respondent's arrangement with Hei was for a contingency fee of 25 percent in accordance with the terms of the written agreement, and not, as respondent asserted, a flat fee for the preparation of the appeal and motion for reconsideration. Nevertheless, respondent collected from Hei $2,214.54, which equaled 35 percent of the amount distributed to the USDOL.[9]

Hei's appeal and her motion for rehearing were ultimately denied and, she received no workers' compensation benefits other than the medical reimbursement she obtained prior to hiring respondent.

3. Hei's Fee Arbitration with Nagel

Hei did not believe that Nagel was entitled to the $12,500 attorney fee he claimed. She therefore decided to request a fee arbitration. In a letter to respondent dated November 22, 1995, Hei asked respondent to assist her with completing the fee arbitration forms, which respondent

[9]On February 7, 1996, respondent disbursed the check for $6,327.26 to the USDOL, and in March the USDOL sent a check in the amount of $2,214.54 to Hei, who endorsed it and forwarded it to respondent.

did. In January 1996, respondent entered into an oral agreement with Hei for an initial retainer fee of $1,250 plus 25 percent of the recovery to prepare her for the Nagel fee arbitration, which she intended to conduct in propria persona.[10] A hand-written document prepared by respondent that appears to have been signed by Hei on January 12, 1996, confirmed this fee arrangement. Furthermore, respondent again described the fee agreement of $1,250 plus 25 percent for the Nagel arbitration in his disbursement letter, which Hei appears to have signed on January 15, 1996. Nevertheless, Hei testified at trial that she never agreed to pay respondent anything for his assistance in preparing for the fee arbitration.

Hei filed the request for the arbitration with Nagel on March 28, 1996, and the matter was set for July 10, 1996. On the day before the arbitration, Hei wrote to respondent asking him to appear on her behalf at the arbitration and offered to pay him for his time. Respondent entered into a written agreement with Hei, charging $500 for his appearance, which Hei signed the day of the arbitration. Hei agreed to pay respondent $100 every two weeks. The agreement also provided that if Hei were more than three days late on a payment, the entire amount would be due and payable and that Hei granted respondent a lien on her home to secure the fee. Respondent admits that at the time he entered into the agreement to secure his fee with a lien on her home, he did not advise Hei to seek the advice of an independent attorney. (See Rule 3-300.)

[10]It appears that in this context, "recovery" meant any amount by which Nagel's claim of $12,500 in fees could be reduced through arbitration.

In July or August 1996, the fee arbitrator issued an award in Nagel's favor in the amount of $12,500. Respondent and the State Bar stipulated that Nagel was paid $12,500 for his representation of Hei in the Beasla litigation.

4. Other Legal Services Provided to Hei

According to respondent's testimony, on July 25 and 31, 1996, Hei also requested additional assistance from respondent regarding seniority and benefit rights with her labor union and advice on injunction laws. The record discloses that respondent provided at least some additional counsel in regard to these issues, as evidenced by Hei's letter to respondent dated July 31, 1996, in which she thanked respondent "for notifying all persons involved . . . concerning my [seniority] and my benefits." The record does not reflect any additional fees were paid by Hei for these services.

In August 1997, respondent and Hei participated in a fee arbitration proceeding regarding respondent's fees charged to Hei.

D. Summary of Disbursement of Funds

In sum, from the $50,000 settlement of Hei's personal injury case against the Beasla defendants, Hei received $19,012.29; the USDOL retained $4,112.72 out of the $6,327.26 in satisfaction of its lien; and the two attorneys together received $26,875.99 or 53.75 percent (respondent's fees were $10,910.45 + $1,250 + $2,214.54 for a total of $14,874.99, and Nagel was paid $12,500). Hei paid respondent an additional $500 for his appearance at the fee arbitration.

II. DISCUSSION

A. Count One: Unconscionable Fees (Rule 4-200)

Rule 4-200(A) provides in relevant part that a member of the State Bar "shall not enter into an agreement for, charge, or collect an . . . unconscionable fee." In count one of the NDC, respondent was charged with violating rule 4-200 in five instances: (1) the 35 percent contingency fee specified in the retainer agreement for the personal injury suit; (2) the 35 percent contingency fee to represent Hei in her workers' compensation suit; (3) the fee of $1,250 to assist Hei in preparing for the Nagel fee arbitration; (4) the additional $500 fee charged and collected to appear at the Nagel fee arbitration; and (5) the imposition of a lien on Hei's home as security for the $500 appearance fee.

For the reasons set forth below, we conclude that respondent is culpable of charging and/or collecting an unconscionable fee in only two of the five instances identified in the NDC: 1) the contingency fee he collected for the personal injury suit; and 2) the contingency fee he collected for Hei's workers' compensation claims.

1. Contingent Fee for Personal Injury Cases

Ordinarily, if an attorney charges a fee that is " 'so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called, such a case warrants disciplinary action . . . .' " (*Herrscher v. State Bar* (1935) 4 Cal.2d 399, 402.) Nevertheless, "a contingent fee ' "may properly provide for a larger compensation than would otherwise be reasonable." ' [Citations.] This is because a contingent fee involves economic considerations separate and apart from the attorney's work on the case." (*Cazares v. Saenz* (1989)

208 Cal.App.3d 279, 287-288.) A contingent fee must take into account both the risk as to the ultimate success of the case and the risk as to the amount recovered. (*Id*. at p. 288.) Furthermore, "the lawyer under such an arrangement agrees to delay receiving his fee until the conclusion of the case, which is often years in the future. The lawyer in effect finances the case for the client during the pendency of the lawsuit. [Citation.]" (*Ibid*.)

We agree with the hearing judge that respondent violated the unconscionable fee prohibitions in rule 4-200 in connection with Hei's personal injury case, but we emphasize that our determination of unconscionability is not based on his written agreement specifying a 35 percent contingency fee, since, as we explain below, we conclude there was no valid or enforceable fee agreement. Rather, our finding of unconscionability is based on the hearing judge's finding that respondent failed to disclose to Hei that he intended his 35 percent contingency fee to be in addition to the fee earned by Nagel. Respondent thus failed "to disclose the true facts, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's funds under the guise of retaining them as fees. [Citations.]" (*Herrscher v. State Bar*, *supra*, 4 Cal.2d at p. 403.) As a consequence, Hei paid respondent far in excess of what she believed she had agreed to pay.

As previously noted, respondent testified that he intended, in entering the fee agreement with Hei, that she "agreed to take the risk . . . of [paying] Mr. [Nagel's] fees. In fact, she agreed to assume the full risk of paying Mr. [Nagel's] fees in exchange for my taking the case." This was neither Hei's understanding nor her intent. She testified that "[n]othing like that was ever explained to me" in response to the prosecutor's question as to whether respondent ever explained

to her that she "would assume the risk that [she] would have to pay out to [respondent] 35-percent of the [Beasla] settlement, and then on top of that pay out [to Nagel] at least 25-percent of the [Beasla] settlement for a total payout of 60-percent of the [settlement proceeds]." This testimonial dichotomy provides the evidentiary basis on which we also conclude that there was no agreement as to fees between Hei and respondent because there was no meeting of the minds. " 'There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and [¶] (a) neither party knows or has reason to know the meaning attached by the other . . . .' [Citations.]" (*Merced County Sheriff's Employees' Assn. v. County of Merced* (1987) 188 Cal.App.3d 662, 676 (*Merced*).) In *Merced*, the court concluded that the firefighters' employees' association and the county had failed to enter into a contract due to (1) the ambiguity of material contract language, (2) the two differing interpretations each placed on the ambiguous language, and (3) each party's lack of knowledge as to the interpretation placed on the ambiguous language by the other party. (*Id*. at pp. 674-676.)

In the present case, respondent's written contingent fee agreement with Hei was materially ambiguous. It stated "Attorney shall receive as a fee: [¶] 35% of settlement &/or judgment; *total*." (Emphasis added.) There was no explanation of the term "total" in the contract, and under the circumstances, it would be reasonable for Hei to understand, as she testified, that she agreed to a "total" of 35 percent of any settlement or judgment proceeds to be paid to both respondent and Nagel. Nothing in the record provides us with any basis for concluding that either respondent or Hei had any reason to know that each of them had a different interpretation of the contract language. Respondent testified that he explained his position to Hei, but she testified that

respondent never explained that to her. The hearing judge found Hei's testimony to be credible. We give great deference to this credibility determination (Rules Proc. of State Bar, rule 305(a); *Franklin v. State Bar* (1986) 41 Cal.3d 700, 780), and we adopt it. Thus, as in *Merced*, *supra*, 188 Cal.App.3d at p. 676, we "have no alternative but to declare that the parties failed to reach a meeting of the minds. . . ."

In the absence of a valid fee agreement, we measure respondent's compensation based on a theory of quantum meruit, rather than the full contract price. (*Spires v. American Bus Lines* (1984) 158 Cal App.3d 211, 216.) Here, as in *Spires*, we have successive attorneys, each of whom was retained for the same matter on a contingency basis and each with a quantum meruit claim.[11] (*Ibid.*) Under such circumstances, where "the contingent fee is insufficient to meet the quantum meruit claims of both discharged and existing counsel, the proper application of the *Fracasse* rule[[12]] is to use an appropriate pro rata formula which distributes the contingent fee among all discharged and existing attorneys in proportion to the time spent on the case by each. Such a formula insures that each attorney is compensated in accordance with work performed, as contemplated by *Fracasse*, while assuring that the client will not be forced to make a double payment of fees." (*Ibid.*) It should be noted that the agreed upon contingent fee acts as an upper limit on the amount to be divided on a quantum meruit theory between the discharged and

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[11]Under *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790-791, an attorney such as Nagel, who is discharged before the contingency occurs, and who was initially hired pursuant to a contingent fee contract, is entitled to be compensated on a quantum meruit basis for the reasonable value of his or her services, rather than at the contract price.

[12]See "*Fracasse* rule" as discussed in footnote 9, *ante*.

retained attorneys hired on a contingency basis in the same case. (*Cazares v. Saenz, supra*, 208 Cal.App.3d at p. 289.)[13] Using the quantum meruit formula articulated in *Spires* and *Cazares*, we conclude that Nagel and respondent together were entitled to charge Hei a total fee of 35 percent of the gross recovery of $50,000, or $17,500. Since the reasonable value of Nagel's services were determined in arbitration to be 25 percent of the recovery, or $12,500, the reasonable value of respondent's services was the remaining 10 percent of the gross recovery or $5,000. In fact, respondent retained $10,910.45 as his contingency fee for his services related to the personal injury litigation.

Fracasse, *Spires* and *Cazares* are not discipline cases; they involved civil claims for recovery of attorney fees. Accordingly, these cases are not necessarily precedent for concluding that respondent's fee was unconscionable under rule 4-200. But, we look to these cases as benchmarks for determining reasonable compensation using a quantum meruit analysis. In so doing, we conclude that the fee charged by respondent to represent Hei in the personal injury suits

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[13]We expressly reject the State Bar's reliance on *Cazares v. Saenz*, *supra*, 208 Cal.App.3d at pp. 287-288 as authority for a *per se* rule of unconscionability under rule 4-200 in every instance where successive attorneys represent a client and the second attorney charges a contingency fee which, when added to the previous fee charged, exceeds 30 to 40 percent. Indeed, in its brief on review, the State Bar concedes – and we agree – that a second contingency fee may be charged pursuant to a fee agreement, *if* the attorney fully discloses the exact nature of his or her fees, i.e., that they are in addition to those charged by the first attorney, and the attorney has obtained the informed consent of the client. Under those circumstances (which were not present in the instant case) it is possible that the range of reasonable fees charged by the initial attorney and the successive attorney in total could exceed 30 to 40 percent, particularly when the case is more difficult than the first attorney initially anticipated, the case has been poorly investigated and/or prepared by the first attorney, trial is imminent, the case presents novel theories that had been unanticipated by the previous attorney, or other circumstances justify an enhanced contingency fee.

was unconscionable since it was more than twice as much as his client agreed to and also double what he was entitled to under a quantum meruit theory.

Our conclusion is reinforced by the language of the written Attorney Client Retainer Agreement, which respondent prepared. Although void for lack of mutual assent, the agreement nevertheless is strong evidence of respondent's overreaching, since it contains express provisions that are anathema to respondent's fiduciary relationship with his client, and indeed are against the public policy of this state. Specifically, the language of the agreement was intended to prohibit Hei from settling or dismissing her case unless respondent agreed. This has long been held to be an improper intrusion on the unilateral right of clients to control the outcome of their cases. (*Hall v. Orloff* (1920) 49 Cal.App. 745, 750.) The retainer agreement also expressly prohibited Hei from substituting another attorney for respondent without cause unless respondent consented. Such a provision also violates a fundamental public policy of California. "It has long been recognized in this state that the client's power to discharge an attorney, with or without cause, is absolute (Citation)." (*Fracasse v. Brent, supra,* 6 Cal.3d at p.790.)[14] In those cases where discipline has been imposed for excessive fees, "there has usually been present some element of fraud or overreaching on the attorney's part. . . ." (*Herrscher v. State Bar*, *supra*, 4 Cal.2d at p.403.)

[14]We are troubled that these two provisions may be incorporated in respondent's standard fee agreement because he used virtually the identical language in his Attorney Client Retainer Agreement in connection with Hei's workers' compensation matter.

Thus, based on the amount charged and collected by respondent for the personal injury lawsuit, as well as the evidence of respondent's overreaching,[15] we conclude the contingency fee charged and collected by respondent in the personal injury cases was unconscionable in violation of rule 4-200.

2. Contingent Fee for Hei's Workers' Compensation Case

As noted *ante*, respondent and Hei entered into a second written Attorney Client Retainer Agreement pursuant to which respondent would receive "25% of benefits/settlement/judgment" arising from Hei's workers' compensation claim. Respondent testified that the parties orally modified the agreement to provide for a flat fee for the appeal and motion for reconsideration, but Hei testified that she never voided or canceled the written 25 percent contingency fee agreement. We agree with the hearing judge who resolved this conflicting evidence in favor of Hei, particularly in view of respondent's failure to correct her understanding of the 25 percent contingency arrangement which Hei confirmed in a letter of July 31, 1996.

We accordingly find respondent is not entitled to *any* contingent fee for his representation of Hei in her workers' compensation case, since the contingency did not occur, i.e., respondent failed to obtain any employment benefits for her from the USDOL. Hei only received the medical reimbursement she had obtained herself prior to hiring respondent. Further, there was no provision in the agreement that authorized respondent to deduct his fees from Hei's recovery in

[15]The fact that the fee agreement contained two provisions that are void for public policy does not in this instance preclude a determination that respondent is entitled to recover his fee on a quantum meruit basis. (*Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 463.)

her personal injury suit, and yet this is precisely what he did.[16] Respondent ultimately charged and collected from her personal injury settlement a fee of $2,215.49 (equaling 35 percent of the $6,327.26 paid to the USDOL). Moreover, like the personal injury contingent fee agreement, the workers' compensation fee agreement contained two provisions void for public policy, a provision prohibiting Hei from settling the case without respondent's consent and a separate provision prohibiting Hei from discharging respondent unless for cause or with respondent's consent. On the basis of the unauthorized $2,215.49 fee collected by respondent in connection with Hei's workers' compensation appeal, together with the evidence of respondent's overreaching, we conclude respondent violated the unconscionability provisions of rule 4-200.

3. The Fees Charged for the Arbitration of Nagel's Fees

The hearing judge determined that respondent charged and collected an unconscionable fee in charging $1,250 to assist Hei in preparing for the Nagel fee arbitration, plus an additional $500 to appear at the arbitration on her behalf. The hearing judge based this determination on her finding that it was respondent's responsibility, not Hei's, to participate in the arbitration proceedings because the hearing judge concluded that respondent was obliged to divide his contingency fee with Nagel. But, in order to adopt the hearing judge's determination, it would be necessary to find that respondent had a pre-existing duty to negotiate, arbitrate, or litigate Hei's fees with Nagel, which we decline to do. Respondent was not a party to the retainer agreement between Hei and Nagel.

[16]Respondent unequivocally testified that his fee for representing Hei in her workers' compensation matter was *not* part of the contingency fee he charged for representing Hei in her personal injury matter.

We believe that it was unwise for respondent to disregard Nagel's claim of attorney fees when respondent was subsequently retained by Hei. (See Fishkin, *Attorney Conduct: Resolving the Division of Fees Between Contingency Fee Attorneys* (Aug./Sept. 2000) 26 San Francisco Att'y 11 ["[T]he fee-splitting argument can easily become a power battle . . . . There will be righteous disagreements."].) But, we can find no authority to establish that the wiser course of action amounted to a pre-existing duty of respondent to arbitrate Nagel's fee as a necessary party. Since we do not find that respondent was obliged to arbitrate the fee dispute between Hei and Nagel, we find no basis to conclude that the fees charged for respondent's additional services in preparing Hei for the Nagel fee arbitration were unconscionable.

Again we determine the reasonableness of his fees in quantum meruit and not on the basis of the contract price, because the fee agreement for the Nagel arbitration initially was not in writing as required by sections 6147, subdivision (a) and 6148, subdivision (a).[17] Although the arrangement was subsequently confirmed twice by respondent in writing and signed by Hei, neither writing satisfied the relevant statutory requirements for fee agreements set forth in sections 6147, subdivision (a) and 6148, subdivision (a). Under section 6147, subdivision (b) and section 6148, subdivision (c), respondent's failure to comply with those requirements rendered the agreement voidable at Hei's option. In view of Hei's testimony disputing the existence of the agreement, we treat the agreement as void.

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[17]The agreement for respondent's services in connection with the fee dispute was in the nature of a retainer and contingency fee agreement, and it was foreseeable the fee would exceed $1,000. Hence the applicability of sections 6147 and 6148.

Therefore, respondent was entitled to the reasonable value of his services under the theory of quantum meruit. (*Spires v. American Bus Lines*, *supra*, 158 Cal.App.3d at pp. 216-217.) The record establishes that respondent assisted Hei with the arbitration for approximately four months. Respondent and Nagel sent several letters to each other pertaining to the fees Nagel claimed for his services. From these letters, it appears that respondent obtained and reviewed a detailed hourly billing record provided by Nagel in order to determine the reasonableness of Nagel's claimed fee. Respondent made a pre-arbitration settlement offer, which Nagel declined. In addition, respondent assisted Hei with the paperwork required for the arbitration. Although the record does not reflect the amount of time respondent spent on these tasks, we cannot say on this record that compensation in the amount of $1,250 for these services was unreasonable, much less unconscionable, and therefore we find he is entitled to this amount in quantum meruit.

4. The Lien for Respondent's Fee on Hei's Home

The State Bar's final allegation in count one is that respondent charged Hei an unconscionable fee by requiring Hei to grant him a lien on her home as security for the $500 appearance fee in the Nagel fee arbitration matter. However, respondent concedes that he willfully violated rule 3-300 by requiring Hei to grant him a lien on her home as security for the $500 appearance fee without advising her to consult with an independent attorney or giving her an opportunity to do so, and, as we discuss below, we find him culpable as charged in count two. We decline to find additional culpability for charging an unconscionable fee based on the same facts, as such a finding would be duplicative of count two. (Cf. *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 536.)

B. Count Two: Acquiring an Adverse Interest (Rule 3-300)

Rule 3-300 provides that "[a] member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied: [¶] (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and [¶] (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and [¶] (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition."

As we previously noted, respondent stipulated that he did not advise Hei in writing that she could seek the advice of an independent lawyer or give her a reasonable opportunity to do so at the time he agreed to appear for her at the Nagel fee arbitration in exchange for a fee of $500 and a lien on Hei's home to secure the $500 fee. Respondent concedes in his opening brief on review that he willfully violated rule 3-300, and we agree. (See *Hawk v. State Bar* (1988) 45 Cal.3d 589 [attorney who secured payment of fee by acquiring note secured by deed of trust in client's real property was required to comply with former rule 5-101 regarding obtaining interest adverse to client].)

C. Count Three: Failing to Disclose a Financial Interest (Rule 3-310(B)(4))

The NDC charged respondent in count three with willfully violating rule 3-310(B)(4), which prohibits, inter alia, an attorney from accepting or continuing representation of a client

without written disclosure where the attorney has a financial interest in the subject matter of the representation. The State Bar bases this charge on respondent's purported financial interest in the Nagel fee arbitration because, in the State Bar's view, respondent's entitlement to collect his own attorney fee was based on the amount of Nagel's fee awarded in the arbitration. However, as we previously discussed, respondent believed and indeed expressly intended that his 35 percent contingency fee would be independent of the amount of the fees that Hei was obligated to pay Nagel. Our conclusion that respondent was required to share his contingent fee with Nagel based on a quantum meruit analysis does not alter the evidence that respondent believed at the time he was retained by Hei that she had assumed the risk of paying Nagel the additional 25 percent contingency fee.

"Wilful violation of the Rules of Professional Conduct is established by a demonstration that the attorney ' "acted or omitted to act purposely, that is, that he knew what he was doing or not doing and that he intended either to commit the act or to abstain from committing it. [Citations.]" ' [Citations.]" (*Phillips v. State Bar* (1989) 49 Cal.3d 944, 952-953.) We do not find clear and convincing evidence that respondent knew he had a financial interest in the Nagel fee arbitration, and therefore he did not wilfully fail to disclose that interest to Hei in writing before accepting or continuing his representation of Hei. (Compare *Beery v. State Bar* (1987) 43 Cal.3d 802, 815 [where, in entering into business transaction with client, attorney concealed material facts from client and carefully presented transaction in most favorable light, attorney "knew what he was doing and intended to commit the acts"].) Under these circumstances, we conclude that respondent is not culpable of willfully violating rule 3-310(B)(4).

D. Count Four: Failure to Perform Competently (Rule 3-110(A))

In count four of the NDC, respondent was charged with intentionally, recklessly or repeatedly failing to perform legal services competently in violation of rule 3-110(A). The NDC in count four incorporates by reference count one and adds the allegations that respondent failed to properly disburse the settlement proceeds to Hei and that he should have been a party to the fee arbitration. We do not believe these additional allegations provide a sufficient basis to impose additional culpability, because the remaining facts alleged in count four are either duplicative of or intrinsic to our culpability determinations in counts one through three. The appropriate resolution of this matter does not depend on how many rules of professional misconduct or statutes proscribe the same misconduct. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) We therefore dismiss count four as duplicative.

E. Count Five: Moral Turpitude (Section 6106)

In count five of the NDC, respondent was charged with committing acts of moral turpitude in violation of section 6106 by gross overreaching in breach of his fiduciary duty to Hei by (1) charging and collecting a 35 percent contingency fee for Hei's personal injury matter in addition to the 25 percent contingency fee Nagel was claiming; (2) requiring Hei, instead of respondent, to pursue the fee arbitration against Nagel; (3) charging Hei a 35 percent contingency fee for the Nagel fee arbitration; (4) collecting $1,250 as a contingency fee for the Nagel fee arbitration before Hei received any award in the Nagel fee arbitration; (5) requiring Hei to give respondent a lien on her home on the day of the Nagel arbitration; and (6) charging Hei another $500 to appear on her behalf at the Nagel fee arbitration. The hearing judge determined, and we agree, that there

was insufficient evidence to find that respondent's misconduct rose to the level of acts involving dishonesty, corruption, or moral turpitude.

III. DISCIPLINE

A. Aggravation

We agree with the hearing judge's determination that respondent engaged in multiple acts of wrongdoing, but we give this little weight. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(b)(ii).) Respondent charged Hei unconscionable fees in both her personal injury case and her workers' compensation case, and in addition admitted his culpability of entering into an improper business transaction with Hei. These three acts support a finding in aggravation that respondent engaged in multiple acts of misconduct. (See *In the Matter of Malek-Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627 [two violations of failure to supervise resulting in trust fund violations, plus improper threat to bring criminal action constituted multiple acts of wrongdoing in aggravation]; but see *In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 177 [one client matter involving misappropriation, failure to promptly pay funds at client's request and failure to inform client of right to seek independent counsel, plus failure to report sanctions in another client matter were not viewed by this court "as strongly presenting aggravation on account of multiple acts of misconduct . . . ."].)

We disagree with the hearing judge's finding of aggravation that respondent's misconduct was surrounded by overreaching (std. 1.2(b)(iii)), as we have already relied on respondent's

overreaching as a partial basis for our findings of unconscionable fees. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 176.)

We agree with the hearing judge's finding in aggravation that respondent's misconduct significantly harmed Hei. (Std. 1.2(b)(iv).) The uncontroverted evidence established that respondent's misconduct deprived Hei of her funds at a time when she was in desperate need.

Finally, we disagree with the hearing judge's determination that respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) Respondent readily stipulated to the charge of improper business transaction. Moreover, we agree with some of respondent's contentions which he has asserted in his own defense and have declined to adopt the degree of culpability imposed by the hearing judge. We therefore decline to attach aggravating weight to respondent's good faith defense of his actions.

B. Mitigation

The hearing judge found no circumstances in mitigation.

We agree with the hearing judge's determination that respondent is not entitled to mitigation for his absence of any prior record of discipline (std. 1.2(e)(i)) because he had only been admitted to practice law in California slightly more than two years before his misconduct began. (See *In the Matter of Greenwood* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 831, 837.) We note, however, that since respondent was relatively new to the practice, he may have been inexperienced with the permutations of fee arrangements that comport with the rules of professional conduct.

We also agree with the hearing judge's determination that respondent is entitled to no mitigation for emotional difficulties since there was no expert evidence to establish a causal connection between respondent's anxiety disorder and the misconduct at issue in this case.[18] (Std. 12.(e)(iv).)

However, we believe there are mitigating factors in this case. We note that respondent entered into a pretrial stipulation as to facts pertaining to various charges of misconduct and as to culpability for the charge of entering into an improper business transaction with a client, thus saving State Bar Court time and resources. This conduct is entitled to mitigating weight. (Std. 1.2(e)(v); see *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190.)

In addition, respondent testified as to his pro bono and community service, both in California and in Minnesota. Such evidence is entitled to some weight in mitigation, although the weight of the evidence is somewhat limited because respondent's testimony was the only evidence on the subject, and therefore the extent of respondent's service is unclear. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 647-648; *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158 & fn. 22.)

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[18]From the hearing judge's decision, it appears that the hearing judge admitted and considered the contents of the letter from respondent's psychologist, which respondent attached to his Closing Trial Brief, over the objection of the State Bar in its Closing Reply Trial Brief. We need not and do not address the propriety of the hearing judge's admission of this additional evidence submitted after trial since the evidence did not result in additional mitigation in respondent's favor.

C. Level of Discipline

As we previously noted, the Supreme Court has directed us on remand to reconsider the appropriate degree of discipline in light of the standards, and in so doing, to consider "any ground that may form a basis for an exception to the application [of the standards]." The State Bar correctly notes in its brief on remand that we did not explain in our 2005 opinion why we deviated from standard 2.7, and it urges that we adopt the six months' actual suspension specified by that standard.[19] We are obligated to afford "great weight" to the standards (*In re Silverton, supra,* 36 Cal.4th 81, 89-92), although we believe that the standards do not mandate a specific discipline. Indeed, if the Supreme Court were of the view that the standards provide for mandatory disciplinary outcomes, it would have directed us to simply apply the specific discipline stated in the relevant standards, including standard 2.7, which it obviously did not.

The court's order is consistent with its long-held position that it is "not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222; *Greenbaum v. State Bar* (1987) 43 Cal.3d 543, 550 [the standards are "simply guidelines"]; *Boehme v. State Bar* (1988) 47 Cal.3d 448, 454 [same]; *Hawk v. State Bar, supra,* 45 Cal.3d at p. 602 [same].) Following the Supreme

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[19]The State Bar also argues in its brief on remand that this court should find that respondent's failure to acknowledge his misconduct constitutes an additional factor in aggravation, justifying a greater degree of discipline. However, in view of the Supreme Court's order of remand directing us only to reconsider the recommendation as to discipline, we do not reconsider our earlier findings of culpability, mitigation, or aggravation.

Court's lead, we recently observed in *In the Matter of Oheb* (Review Dept. 2006) ____ Cal. State Bar Court Rptr. ____, that "although the standards were established as guidelines, ultimately, the proper recommendation of discipline rest[s] on a balanced consideration of the unique factors in each case. [Citations.]"

Utilizing this background as guidance, we proceed to consider the relevant standards, as well as the facts and guiding case law. As a general principle, standard 1.3 provides that the primary purposes of the disciplinary proceedings are the protection of the public, the courts, and the legal profession; the maintenance of high professional standards by attorneys; and the preservation of public confidence in the legal profession. (See also *In re Morse* (1995), 11 Cal.4th 184, 205.) The other standards applicable to this case are standards 1.6(a), 2.7 and 2.8. Standard 1.6(a) provides that if two or more acts of misconduct are found, the sanction imposed shall be the more severe of the applicable sanctions. We therefore focus on standard 2.7 because standard 2.8 provides that a violation of rule 3-300 [acquiring an adverse interest] shall result in suspension unless the extent of the misconduct and harm to the client are minimal, whereas standard 2.7 is more specific and provides that a violation of rule 4-200 [entering into an agreement for, charging, or collecting an unconscionable fee] "shall result in at least a six-month actual suspension from the practice of law, irrespective of mitigating circumstances."

In view of the flexible nature of the standards, we must address the seemingly mandatory language of standard 2.7. The only Supreme Court case referring to the application of standard 2.7 cited to us by the State Bar is *Barnum v. State Bar* (1990) 52 Cal.3d 104. In the *Barnum* case, the attorney collected an unconscionable fee, committed acts of moral turpitude, and, additionally,

he willfully disobeyed four court orders and failed to cooperate with the State Bar's investigation. (*Id*. at pp. 110-111.) The Supreme Court did not utilize or otherwise engage in an extensive analysis of the application of standard 2.7 in *Barnum*; instead, the court relied upon Barnum's record of three prior disciplines in determining that the review department's disbarment recommendation was warranted. (*Id*. at p. 113.) Because *Barnum* is factually distinguishable, in part due to the absence of a prior record in the instant case, and because the Supreme Court provided no guidance in *Barnum* as to the interpretation or application of the express language of rule 2.7, we do not find that case to be helpful. The few remaining cases discussing standard 2.7 similarly provide little guidance.[20]

For example, in *In the Matter of Scapa and Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635, we stated that the attorneys' solicitation violations merited a one-year actual suspension and that "the remainder of respondents' offenses [compensating another for purpose of recommending the attorney's services, committing acts involving moral turpitude, sharing legal fees with nonattorneys, and charging unconscionable fees] . . . deserve an additional six months [of] actual suspension." (*Id*. at p. 654.) Thus, although we noted that standard 2.7 provided for a minimum six-month actual suspension for the unconscionable fee offense alone, we did not apply the standard.

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[20]The vast majority of unconscionable fee cases were decided before the standards were implemented. As we discuss *post*, a wide range of discipline was imposed in those cases, from three months' suspension (see, e.g., *Recht v. State Bar* (1933) 218 Cal. 352; *In re Goldstone* (1931) 214 Cal. 490) to disbarment (e.g., *Dixon v. State Bar* (1985) 39 Cal.3d 335; *Tarver v. State Bar* (1984) 37 Cal.3d 122).

Similarly, in *In the Matter of Yagman* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 788, we noted the minimum six-month actual suspension set forth in standard 2.7, but we did not discuss or analyze the impact of that standard on our overall discipline recommendation. There, we recommended a one-year actual suspension for numerous violations in addition to the unconscionable and illegal fee violations, i.e., failure to communicate a written settlement offer, failure to promptly pay out client funds, failure to render an appropriate accounting, and commingling and misappropriating funds. (See also *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. ___ [analysis confined to whether six months' actual suspension provided by standard 2.7 is additive when further misconduct warrants actual suspension]; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [standard 2.7 used as guideline for level of discipline, but case involved an illegal fee rather than an unconscionable fee].)

Because the above cases provide scant assistance as to the proper interpretation of standard 2.7, we look to Supreme Court cases applying standards 2.2 (a) and (b), both of which mirror the seemingly mandatory language of standard 2.7 specifying a minimum period of actual suspension "irrespective of mitigating circumstances."[21]

Edwards v. State Bar (1990) 52 Cal.3d 28, involved an attorney who was culpable of commingling funds and wilful misappropriation. The Supreme Court declined to adopt this

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[21]Standard 2.2(a) provides in relevant part that wilful misappropriation "shall result in disbarment" unless the amount involved is insignificant, in which case "the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances." Standard 2.2(b) provides in relevant part that commingling of funds or misappropriation not involving a wilful act "shall result in at least a three month actual suspension from the practice of law, irrespective of mitigating circumstances."

court's discipline recommendation of two years' actual suspension finding it "excessive." (*Id*. at p. 39.) The *Edwards* decision is most useful to our analysis because there the Supreme Court expressly rejected an inflexible interpretation of the language of standard 2.2(a), which provides: "the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances." (This language mimics the provisions of standard 2.7.) The court adopted the following approach: "This standard [2.2(a)] correctly recognizes that willful misappropriation is grave misconduct for which disbarment is the usual form of discipline. In requiring that a minimum of one year of actual suspension invariably be imposed, however, the standard is not faithful to the teachings of this court's decisions. [Citation.] The standard's one-year minimum should be regarded as a guideline, not an inflexible mandate." (*Id.* at p. 38.)

Also, in *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, the Supreme Court rejected the review department's application of standard 2.2(b) as requiring three months' actual suspension. Even though the Supreme Court adopted the review department's determination that Dudugjian was culpable of willful commingling and failing to promptly pay out client funds, the court concluded that public reproval was the appropriate discipline under the facts of the case. The court focused on Dudugjian's honest belief that the clients had given him permission to retain their settlement funds and rejected the review department's recommendation.

In *Howard v. State Bar, supra,* 51 Cal.3d 215, the Supreme Court imposed a six-month actual suspension instead of the one-year actual suspension recommended by the review department and ostensibly mandated by the language of standard 2.2(a) stating that discipline for misappropriation of entrusted funds "shall not be less than a one-year actual suspension,

irrespective of mitigating circumstances." Approximately two years after being admitted to practice law, Howard misappropriated approximately $1,300 from a client's personal injury settlement proceeds and failed to communicate with the client for approximately two months. Although the court acknowledged the mandatory language of standard 2.2(a), it nevertheless determined that a six-month actual suspension was sufficient based upon Howard's evidence presented in mitigation that she had lifelong psychological problems leading to drug and alcohol abuse and that she had been sober for approximately two and one-half years at the time of trial.

In *Brockway v. State Bar* (1991) 53 Cal.3d 51, the Supreme Court imposed a three-month actual suspension notwithstanding the one-year suspension seemingly required by standard 2.2(a). There, the attorney misappropriated $500 of client funds, failed to pay out client funds promptly upon request, and improperly acquired an interest adverse to his client. Although aggravating factors were present, the court focused on mitigating factors and determined that "the minimum one-year period suggested by Standard 2.2(a) would be unduly harsh" under all of the circumstances. (*Id.* at p. 66; see also *Kelly v. State Bar* (1991) 53 Cal.3d 509 [attorney failed to deposit client funds in trust, commingled funds, failed promptly to pay out client funds, and misappropriated $750 in client funds; court refused to apply standard 2.2(a) rigidly and, focusing on circumstances surrounding the misappropriation as well as mitigation evidence, determined that a 120-day actual suspension was appropriate]; *Bates v. State Bar* (1990) 51 Cal.3d 1056 [attorney culpable of misappropriating $1,229.75 and of misrepresenting status of funds; Supreme Court adopted review department recommendation of six-month actual suspension in view of mitigation evidence].)

The foregoing cases make clear that, where appropriate, the Supreme Court will not hesitate to impose a level of discipline lower than that specified by a standard's seemingly mandatory language, even when the standard expressly provides for a minimum discipline "irrespective of mitigating circumstances."

In our consideration of the appropriate level of discipline, we look to other cases involving unconscionable fees. A survey of the unconscionability cases reveals that *Recht v. State Bar, supra,* 218 Cal. at p. 352, and *In re Goldstone, supra,* 214 Cal. 490, are at the lenient end of the disciplinary spectrum since both impose three months' actual suspension. In *Recht v. State Bar, supra,* 218 Cal. 352, an attorney who was found culpable of charging exorbitant and unconscionable fees to two clients and making misrepresentations to induce them to employ him was actually suspended for three months. (*Id*. at p. 353.) The attorney represented an investment trust and thereby obtained confidential information which he used to his own advantage in soliciting employment from two investors in the trust. He did not reveal his professional relationship to the trust at the time the investors engaged his services and further made express false representations about the circumstances of his representation of their interests in the trust. The court also found that Recht attempted to shift blame to a third party and noted that Recht had made no restitution to his clients and had made no attempt to do so until after the local administration committee suggested to Recht that their recommendation might be affected by restitution. (*Id*. at p. 354.)

The conduct in *Recht v. State Bar, supra,* 218 Cal. 352, was more serious than in this matter because it involved intentional misrepresentations, which the court found violated "the

very fundamentals of common honesty and fair dealing" (*Id*. at pp. 354-355). However, in ordering that Recht be actually suspended from the practice of law for a period of three months rather than imposing a more serious discipline, the court seemingly gave significant weight to Recht's youth and inexperience. (*Id*. at 355.)

In *Goldstone v. State Bar, supra*, 214 Cal. 490, a three-month suspension was imposed where an attorney was found culpable of one count of charging an unconscionable fee. The court found that in charging the fee, Goldstone performed no service of value, which the court viewed as "a species of dishonesty which no court should condone." (*Id*. at p. 497.) In the instant case, respondent performed the agreed-upon work in Hei's personal injury and workers' compensation cases. Respondent's transgressions were confined to one client, but he charged an unconscionable fee in two instances.

The remaining cases, and certainly the more current ones, have imposed actual discipline from six months to disbarment. The State Bar urges a minimum of six months' actual suspension as appropriate in this matter, but, in every case, except arguably *Bushman v. State Bar* (1974) 11 Cal.3d 558,[22] there has been additional, serious misconduct associated with the charging of an unconscionable fee. (See, e.g. *Barnum v. State Bar, supra*, 52 Cal.3d 104 [disbarment for charging unconscionable fees plus violation of four court orders and extensive history of prior discipline]; *In the Matter of Scapa and Brown, supra,* 2 Cal. State Bar Ct. Rptr. 635 [one-year

[22]In *Bushman v. State Bar, supra,* 11 Cal.3d 558, the court imposed a one-year suspension where the attorney was culpable of charging an unconscionable fee and soliciting professional employment by advertising in violation of the Rules of Professional Conduct then in effect. Three of the four clients in the matter were on welfare, and one was a minor.

actual suspension for charging unconscionable fee plus numerous solicitation violations, acts of moral turpitude, and splitting legal fees with non-attorneys]; *In the Matter of Yagman, supra,* 3 State Bar Ct. Rptr. 788 [one-year actual suspension for unconscionable fee of $378,175, plus, inter alia, acts of moral turpitude in misleading the court, commingling funds, misappropriation, failing to communicate a settlement offer, and failing to account and a prior discipline for charging unconscionable fee].)

In our most recent case of *In the Matter of Wells, supra*, 4 Cal. State Bar Ct. Rptr. ___, we recommended six months' actual suspension[23] where an attorney, in addition to charging unconscionable and illegal fees to two clients, was culpable of engaging in the unlawful practice of law in another state, committing acts of overreaching with her clients, giving false information to officials in California and South Carolina investigating her law practice, and failing to return unearned fees or maintain a trust account. In aggravation, Wells was previously disciplined and she demonstrated indifference. In mitigation, Wells entered into an extensive stipulation of facts as to her culpability, suffered from extreme emotional distress, and presented eight character witnesses, including a retired superior court judge and three attorneys. Respondent's misconduct did not involve such wide-ranging misconduct and his actions were confined to one client. Whereas respondent had no prior record and indeed had only been practicing law for two years at the time he was retained by Hei, Wells had practiced in California since 1984 and had a prior

[23]By Supreme Court order dated June 14, 2006, in case no. S140918, the court ordered the imposition of the recommended discipline.

discipline record. In our view, the misconduct in the *Wells* case clearly warranted greater discipline than in the instant case.

The State Bar cites *Finch v. State Bar* (1981) 28 Cal.3d 659, 664-665, wherein the Supreme Court imposed six months' actual suspension as the result of the collection of an unconscionable fee. But Finch admitted to many other acts of misconduct including that he: (1) misappropriated client funds in two matters, in the total amount of $5,750; (2) forged a client's signature on a settlement check; (3) failed to perform services in three matters; (4) failed to return unearned fees promptly; (5) failed to forward client files and documents to subsequent counsel; and (6) withdrew from representing a client without taking reasonable steps to avoid foreseeable prejudice to the client. The court there considered in mitigation that Finch was a rehabilitated alcoholic, that he believed he had his client's authority to sign the client's name on the settlement check and that he acknowledged his wrongdoing. (*Id*. at pp. 665-666.) However, the court discounted the lack of a prior disciplinary record because the misconduct commenced less than three years after Finch's admission (*Id*. at p. 666, fn. 3), and it also discounted the restitution paid to clients because it was made under pressure. (*Id.* at p. 666.)

The totality of the circumstances is far more serious in *Finch v. State Bar, supra,* 28 Cal.3d 659, as that case involved misappropriation, failure to perform and forgery. In contrast to respondent's misconduct, which involved one client and in part was due to his inexperience, the Supreme Court characterized the misconduct in *Finch* as "habitual," warranting a "severe" discipline of six months. (*Id.* at p. 665.)

We find that the more lenient, older cases of *Recht v. State Bar, supra,* 218 Cal. 352, where the court seemingly gave significant weight to the attorney's youth and inexperience and *In re Goldstone, supra,* 214 Cal. 490, which involved misconduct most commensurate with the present case, are most relevant to our discipline analysis. But, in view of the paucity of *recent* unconscionable fee cases having misconduct similar to the instant case, we again turn our attention to the six-month minimum actual suspension proposed by standard 2.7, mindful that it must be given "great weight." (*In re Silverton, supra,* 36 Cal.4th at p. 92.) In so doing, we have taken great care to consider the unique factors of this case that we conclude justify a departure and support our conclusion that three months' actual suspension is appropriate under the circumstances.

We found in this case that respondent is culpable of charging an unconscionable fee on two occasions and entering into a business transaction with his client without securing a waiver. Our finding of unconscionability is based on our determination that the fees charged by respondent should be measured in quantum meruit since there was no meeting of the minds between respondent and his client as to the amount to be paid. The unconscionable fee violations thus are the result of respondent's erroneous conclusion that his client agreed to pay his contingency fees in addition to the fee she was obligated to pay her prior counsel. Moreover, respondent was relatively new to the practice when he accepted Hei as a client, and the fact that he charged the unconscionable fees was in large measure due to his inexperience rather than to any intent to injure his client or acquire an advantage.

The fact that respondent may have intended no harm in charging the fees does not shield him from culpability (see *Edwards v. State Bar, supra*, 52 Cal.3d at p. 38; see also *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 309); but we may nevertheless consider this in determining the appropriate level of discipline. (E.g., *Kelly v. State Bar*, *supra*, 53 Cal.3d 509, 519-520.) Furthermore, respondent did in fact perform substantial work for Hei in both cases, as he took the Corea defendants to trial in Hei's personal injury case and filed an appeal and a rehearing motion in Hei's workers' compensation case. Additionally, we have found but one aggravating circumstance of consequence – harm to his client – as well as evidence of off-setting mitigation as the result of respondent's partial stipulation as to culpability before trial and his pro bono and community activities.

The hearing judge recommended that respondent receive a one-year stayed suspension, a three-year probationary period, and six months' actual suspension based on her assessment that respondent was culpable of four counts of misconduct, as well as four factors in aggravation and no mitigation. We have found much less culpability and less aggravation than the hearing judge, and, in addition, we have found evidence in mitigation, where the hearing judge found none. We thus conclude, in view of the unique circumstances of this case, the guiding standards and the relevant case law, that a one-year stayed suspension and a two-year period of probation with a period of three months' actual suspension on the conditions set forth below is sufficient to serve the goals of these disciplinary proceedings.

D. Restitution

In view of our determination that respondent collected unconscionable fees with regard to Hei's personal injury and workers' compensation cases, we also recommend that respondent should be required to pay restitution of any amounts in excess of reasonable compensation for these cases. As we earlier concluded, respondent was entitled, based on quantum meruit, to retain only 10 percent of the total $50,000 settlement proceeds or $5,000 for Hei's personal injury case. He also was entitled, on a quantum meruit basis, to retain $1,250 for his preparation for the Nagel fee arbitration and $500 for his appearance at that arbitration, for a total of $6,750 in fees. Because respondent received a total of $14,874.99 in fees, he must make restitution in the amount of $8,124.99 plus interest. Respondent must therefore refund to Hei $5,910.45 plus interest from the date of payment of the attorney fee by Hei to disgorge the unconscionable fees he charged in the personal injury lawsuit, and $2,214.54 plus interest to the United States Department of Labor from the date of the attorney fee it paid in connection with his representation of Hei in the workers' compensation case.

IV. RECOMMENDATION

We recommend that respondent David M. Van Sickle be suspended from the practice of law in the State of California for one year, that execution of this suspension be stayed, and that respondent be placed on probation for two years on the following conditions:

1. That respondent be actually suspended from the practice of law in the State of California during the first three months of probation.

2. During the period of his probation, respondent must make restitution to Ivy Hei in the amount of $5,910.45 plus simple interest thereon at the rate of 10 percent per annum from the date of respondent's receipt of attorney fees in the *Hei v. Beasla* suit (January 15,

1996) until paid (or to the Client Security Fund to the extent of any payment from the fund to Hei, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnish satisfactory proof of such restitution to the State Bar's Office of Probation. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

3. During the period of his probation, respondent must make restitution to the United States Department of Labor (USDOL) in the amount of $2,214.54 plus simple interest thereon at the rate of 10 percent per annum from the date of respondent's receipt of payment from the USDOL of attorney fees arising from Hei's workers' compensation matter until paid (or to the Client Security Fund to the extent of any payment from the fund to the USDOL, plus interest and costs, in accordance with Business and Professions Code section 6140.5) and furnish satisfactory proof of such restitution to the State Bar's Office of Probation. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d). Within the first 90 days after the effective date of the Supreme Court order in this matter, the Office of Probation must determine the date respondent received payment from the USDOL. Respondent must fully cooperate with and assist the Office of Probation in making this determination, which is subject to de novo review by the State Bar Court on motion of respondent or the State Bar.

4. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

5. Respondent must report, in writing, to the State Bar's Office of Probation in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation (reporting dates). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

(a) in the first report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

(b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

6. Subject to the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

7. Within one year after the effective date of the Supreme Court order in this matter, respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Accord, Rules Proc. of State Bar, rule 3201.)

8. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the end of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from the practice of law for one year will be satisfied, and the suspension will be terminated.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court order in this matter and to

provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

VI. RULE 955

We further recommend that respondent be ordered to comply with rule 955 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

VII. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

EPSTEIN, J.

We concur:

STOVITZ, P. J.

WATAI, J.

Case No. 99-O-12923

In the Matter of David M. Van Sickle

Hearing Judge

Hon. Pat McElroy

Counsel for the Parties

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